Supreme Court, U.S.

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF PLACER,

Petitioner,

vs.

YOVANA GUTOWSKY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

I. Does a 42 U.S.C. § 1983 employment discrimination cause of action accrue at the time of the discriminatory act?

II. Does the "continuing violation" doctrine used in Title VII[1] claims extend the accrual date for a 42 U.S.C. § 1983 *Monell*[2] employment discrimination action to last day of employment, particularly when the last act of alleged discrimination did not fall within the limitations period?

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1. 42 U.S.C. § 2000e, *et seq.*

2. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, County of Placer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 108 F.3d 256, and is reproduced in the appendix filed herewith (App. B, 3a-16a). Petitioner filed a petition for rehearing with suggestion for rehearing en banc on March 20, 1997. The order denying the petition was issued by the Court of Appeals on April 17, 1997, and is reproduced in the Appendix filed herewith at (App. A, 1a-2a). The order after hearing of the District Court is reproduced in the Appendix at (App. E, 25a-26a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision, 42 U.S.C. § 1983, is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent brought an action alleging civil rights violations pursuant to 42 U.S.C. § 1983 (hereinafter "§ 1983"). The complaint made no Title VII claims. Respondent claimed sexual harassment and gender discrimination in her complaint, which named the County of Placer as the sole defendant. The complaint made no claim of wrongful termination. Respondent's complaint purported to state a cause of action for relief alleging equal protection violations pursuant to the Fourteenth Amendment of the United States Constitution and provisions of the California Constitution. Respondent further alleged a violation of her due process rights pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and provisions of the California Constitution.

Following discovery, Petitioner County of Placer, brought a motion for summary judgment, which was granted and a subsequent judgment entered in favor of the County. The District Court found all of Respondent's claims to be time barred. (E.R.[3] p. 474). Respondent appealed the District Court's ruling on the gender discrimination claim only, and did not appeal the court's ruling on her sexual harassment claim. (Brief of Respondent, p. 4). On appeal the Ninth Circuit Court of Appeals reversed on the grounds the continuing violation doctrine extended the accrual date of plaintiff's § 1983 cause of action to her last day of employment. The district court had found plaintiff's complaint to be seventeen (17) months late.

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3. Petitioner will use Respondent's designation of "E.R." to reference the Excerpt of Record on Appeal filed by Respondent in the court of appeals.

Gutowsky became a County employee in the Department of Public Works in March of 1982. After a temporary job, she became the permanent, full time employee in the position of communications clerk, for the Department of Public Works Road Division, Tahoe office. Gutowsky held the position she remained in until May 26, 1993, when she left work and did not return. Gutowsky filed her complaint on May 24, 1994. (E.R. p. 1).

Gutowsky claims to have made repeated requests to promote to position as a road maintenance worker or equipment operator. The communications clerk position was not a promotional position, (E.R. p. 122, ls. 11-24), and in order for Gutowsky to obtain either a road maintenance job or equipment operator job, she would be required to file an application, undergo the examination process, and be placed on an eligible list, all pursuant to the County's Civil Service Commission rules which have been in place in the County since well before Gutowsky became a County employee. (E.R. p. 123, ls. 5-26). Gutowsky never submitted an application to become either a road maintenance worker or an equipment operator for the County of Placer whether in the Lake Tahoe area or otherwise. (E.R. p. 469).

Gutowsky contends she was discriminated against in not being placed in an equipment operator or road maintenance worker position. She further contends that males were hired or promoted into these positions.

REASONS FOR GRANTING THE WRIT

This court should grant the writ for two reasons:

First, the Ninth Circuit decision conflicts with the relevant decisions of this court. *Chardon v. Fernandez*, 454 U.S. 6, 70 L.

Ed. 2d 6, 102 S. Ct. 28 (1981); *Delaware State College v. Ricks*, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L. Ed. 571, 97 S. Ct. 1885 (1977). The decision establishes the date of accrual for § 1983 employment discrimination claim differently than that for any other § 1983 claim.

Second, there is a split of authority between the Federal Circuit Courts of Appeal and confusion within the circuits on the important Federal question of whether the Title VII continuing violation doctrine is applicable to a § 1983 employment discrimination action. If so, does the continuing violation doctrine extend the accrual date to the last day of employment when the last act of alleged discrimination did not fall within the limitations period. The Ninth Circuit held that the accrual date for such an action is extended to the last day of employment notwithstanding the fact that the complaint was filed seventeen (17) months after the expiration of the statute of limitations for the last discriminatory act (which occurred twenty nine (29) months before the complaint was filed).

I.

DOES A 42 U.S.C. § 1983 EMPLOYMENT DISCRIMINATION CAUSE OF ACTION ACCRUE AT THE TIME OF THE DISCRIMINATORY ACT?

Section 1983 actions are characterized as personal injury actions for purposes of identifying the applicable statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S. Ct. 1938 (1985). Thus, § 1983 actions must be brought within the time specified by the forum state's statute of limitations for personal injury torts. In California, the applicable statute of limitations is Cal. Civ. Proc. Code Sec. 340(3), which provides for a limitations period of one year from the date the cause of action accrues.

Federal law determines when a cause of action accrues and the statute of limitations begins to run for a § 1983 claim. *McDougal v. County of Imperial,* 942 F.2d 668, 672 (9th Cir. 1991); *Norco Construction, Inc. v. King County,* 801 F.2d 1143, 1145 (9th Cir. 1986); *Compton v. Ide,* 732 F.2d 1424, 1432 (9th Cir. 1984). A federal claim accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Norco v. King, supra,* at 1145, quoting *Trotter v. International Longshoreman's Warehousemens' Union,* 704 F.2d 1141, 1143 (9th Cir. 1983).

As with any other § 1983 claim, it is the discriminatory act and the knowledge on the part of the plaintiff which serves as the basis for identifying when the federal claim accrues for a § 1983 employment discrimination claim. As recently as 1994, the Ninth Circuit Court of Appeals held that the commencement of the limitations period for a civil rights action occurs upon notice. In *McCoy v. San Francisco City and County,* 14 F.3d 28, 29 (9th Cir. 1994), the Ninth Circuit cited *Hoesterey v. City of Catheral City,* 945 F.2d 317 (9th Cir. 1991), *cert. denied,* 504 U.S. 910, 112 S. Ct. 1941, 118 L. Ed. 546 (1992), for the proposition that the touchstone for determining the commencement of the limitations period is notice. Thus, "the cause of action generally accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Hoesterey v. City of Catheral City,* at 319. As the District Court pointed out, in applying this standard to the present case, plaintiff's claim was filed 17 months late where the accrual date was the date of the last discriminatory act.

The Ninth Circuit decision to extend the accrual date of a § 1983 employment discrimination cause of action is contrary to this court's decisions in *Chardon v. Fernandez,* 454 U.S. 6, 70 L. Ed. 2d 6, 102 S. Ct. 28 (1981) (limitations period applicable to employment discrimination action under 42 U.S.C. § 1983

held to run from time of notice that appointment would terminate rather than from termination date), *Delaware State College v. Ricks*, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980) (the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful, *id.* at 258, "mere continuity of employment, without more is insufficient to prolong the life of a cause of action for employment discrimination" *Id.*, at 257), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L. Ed. 571, 97 S. Ct. 1885 (1977) (a discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. *Id.* at 558.)

This Court made clear in *Chardon*, and *Evans* that the focus is upon the last act of discrimination as the date of accrual of the cause of action. The Ninth Circuit has disregarded this Court's decisions and instead substituted the last day of employment as the date of accrual regardless of when the last discriminatory act occurred. Such an approach may be appropriate if a wrongful termination claim was being made, but no such claim was being made here. This important federal question of the date of accrual of a § 1983 employment discrimination cause of action requires clarification at this time for the benefit of all of the federal circuits and litigants.

II.

DOES THE "CONTINUING VIOLATION" DOCTRINE USED IN TITLE VII CLAIMS EXTEND THE ACCRUAL DATE FOR A 42 U.S.C. § 1983 *MONELL* EMPLOYMENT DISCRIMINATION ACTION TO LAST DAY OF EMPLOYMENT, PARTICULARLY WHEN THE LAST ACT OF ALLEGED DISCRIMINATION DID NOT FALL WITHIN THE LIMITATIONS PERIOD?

There is great deal of disparity in the treatment given to the "continuing violation" doctrine among the circuits. The circuit courts have differed over whether the continuing violation doctrine is applicable to actions of this type and how it should be applied. Courts finding that the doctrine is applicable because the mere existence of a policy constitutes a continuing violation include *McKenzie v. Sawyer,* 684 F.2d 62, 72 (D.C. Cir. 1982); *Perez v. Laredo Junior College,* 706 F.2d 731 (5th Cir. 1983) and *Williams v. Owens Illinois, Inc.,* 665 F.2d 918, 924 (9th Cir. 1982), *cert. denied,* 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1983). Circuits finding otherwise and basically concluding that § 1983 actions accrue when a plaintiff should be aware of the injury and its connection to the acts of the defendants include *Association Against Discrimination and Employment, Inc. v. City of Bridgeport,* 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied,* 455 U.S. 988, 102 S. Ct. 1611, 71 L. Ed. 2d 847 (1982); *Acha v. Beam,* 570 F.2d 57, 65 (2d Cir. 1978) and *Lavelle v. Listi,* 611 F.2d 1129, 1131 (5th Cir. 1980).

In *Lavelle v. Listi, supra,* the Fifth Circuit held "a cause of action under § 1983 accrues when 'the plaintiff is, or should be, aware of both the injury and the connection with the acts of the defendant.' " *Id.* at 1131. The Sixth Circuit is in accord and in *Dixon v. Anderson,* 921 F.2d 212, 215 (6th Cir. 1991) stated "in determining when the cause of action accrues in § 1983 actions,

we have looked to what event should have alerted a typical lay person to protect his or her rights." *Id.* at 215.

The Tenth Circuit appears to have held both ways in the same case. In *Pike v. City of Mission,* 731 F.2d 655 (10th Cir. 1984), the court said that challenging a systematic policy is not barred since the policy continues to violate the employee's rights, "however, plaintiff may not use the continuing violation theory to challenge discrete acts that occur outside the limitations period even though the impact of the act is continued to be felt." *Pike v. City of Mission,* 731 F.2d at 660 (10th Cir. 1984). This confusion has lead to inconsistent results, a problem, which needs to be rectified by guidance from this Court.

It is the execution of the policy inflicting injury which plaintiff must show in a § 1983 action rather than simply alleging that a policy of discrimination exists. In analyzing respondent's claim, the Ninth Circuit treated this § 1983 claim for employment discrimination as if it were a Title VII claim. The court stated:

> As in a Title VII claim, a policy or practice of continuing discrimination is under attack in a § 1983 claim for *employment discrimination.*

Gutowsky v. County of Placer, 108 F.3d 256, 259 (9th Cir. 1997) (App. C, 13a) (emphasis added). The court missed a significant distinction in terms of the nature of a § 1983 *Monell* action. *Monell* made clear that it is an "execution of a government's policy or custom . . . that inflicts the injury" which gives rise to the liability not the mere existence of the policy. Without the application of a policy to cause injury to a plaintiff, there is no § 1983 violation.

The mere existence of a policy without an application

(discrimination act) does not trigger any statute since the mere existence of the policy is not a § 1983 violation. The Ninth Circuit correctly pointed out that it is the execution of the policy causing injury which is a critical part of a *Monell* claim. Despite this, the court went on to state that without applying the continuing violation doctrine, the accrual of the cause of action would be uncertain. The court stated:

> If the continuing violation doctrine were inapplicable to *Monell* actions, it is difficult to ascertain exactly when such claims would accrue, especially if no specific discriminatory acts evidenced the policy during the year immediately prior to the filing of the lawsuit. *Id.*

This statement demonstrates the Ninth Circuit's failure to recognize the fundamental difference between a § 1983 *Monell* action where the government policy or custom is executed to inflict injury, and a Title VII claim where the mere existence of a policy may be a basis for a claim.

It is not difficult at all to ascertain exactly when a claim accrues under a § 1983 *Monell* action for it is simply the date on which a discriminatory act took place. Gutowsky claimed that the execution of the policy against her consisted of statements by supervisors which she felt were degrading to her by reference to her job or gender. She also felt that the policy was executed in terms of her being denied the right to use County equipment to practice in preparation to take a State test for a job which she did not currently hold and for which she never applied. There were, in fact, discrete acts of discrimination which would have advised a lay person of their cause of action in this case. As the District Court found, none of these acts fell within the limitations period. The court's claim of uncertainty

as to the date of accrual does not lead to the conclusion that the continuing violation doctrine should be applied to § 1983 actions.

In its explanation of its ruling, the District Court found that plaintiff had alleged specific discriminatory acts none of which fell within the limitations period. The District Court found:

> [P]laintiff's complaint filed May 24, 1994 is 17 months late. Plaintiff attempts to revive her claim relying upon testimony of one Peter Caravella who replaced Compton as a supervisor. Plaintiff testified that after he was no longer plaintiff's supervisor Compton continued to make derogatory remarks about women through at least May of 1993. However, these remarks were made to Caravella, and there is no evidence presented to show that plaintiff was present or over heard these remarks, or that they contributed in any way to a hostile work environment so pervasive that it altered the condition of plaintiff's own employment.

(App. D, 21a).

The District Court went on to point out:

> [A]s the Supreme Court stated in *Ricks* and the Ninth Circuit *London* cases cited by defendant teach, her complaint which purports to rely on a continuing civil rights violation theory, as does plaintiff here, the statute of limitations begin to run on the last discriminatory act and not on the date the

> consequences of that act are felt. Here, the last date on which plaintiff worked with and was subject to derogatory remarks from her supervisor, Compton, was in December of 1991. Therefore, the last discriminatory act of sexual harassment directed towards plaintiff occurred on that date.

(App. D, 21a).

In contrast, the Ninth Circuit focused not on the discrete acts of discrimination but on the alleged existence of some policy or practice as supporting application of the "continuing violation" doctrine to this § 1983 case. Contrary to the Ninth Circuit's conclusion, a § 1983 claim for employment discrimination is not the same as a Title VII claim and the continuing violations doctrine is not applicable to § 1983 *Monell.* A specific execution of the policy causing injury must be the basis of the *Monell* action rather than merely the existence of a policy without its application to a particular individual to cause injury.

Under this Court's decisions, a cause of action accrues when the discriminatory act occurs and when plaintiff knows or reason to know of the injury which is the basis of the action. The accrual of the cause of action is not extended or tolled to the last date of employment when there is no actionable conduct at that time such as a wrongful termination claim. The allegation of the existence of a discriminatory policy in violation of the Constitution does not impact the accrual date for discrete discriminatory acts giving rise to a § 1983 employment discrimination cause of action. To hold otherwise would unreasonably extend the accrual of a Section 1983 employment discrimination cause of action to the last day of employment regardless of the number of years between the last discriminatory act and the last date of employment.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 17, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-16850

D.C. No. CV-94-00818-EJG

YOVANA GUTOWSKY,

Plaintiff-Appellant,

v.

COUNTY OF PLACER,

Defendant-Appellee.

ORDER

Before: LAY,* GOODWIN and SCHROEDER, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Schroeder has voted to reject the suggestion for rehearing en banc, and Judges Lay and Goodwin so recommend.

The full court has been advised of the suggestion for

* Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 6, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-16850

CT/AG#: CV-94-00818-EJG

YOVANA GUTOWSKY

Plaintiff - Appellant

v.

COUNTY OF PLACER

Defendant - Appellee

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED.

Filed and entered March 6, 1997

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 6, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

YOVANA GUTOWSKY,
Plaintiff-Appellant,

v.

COUNTY OF PLACER,
Defendant-Appellee.

No. 95-16850

D.C. No. CV-94-00818-EJG

OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
January 14, 1997—San Francisco, California

Filed March 6, 1997

Before: Donald P. Lay,* Alfred T. Goodwin and Mary M. Schroeder, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

Labor and Employment/Employment Discrimination

The court of appeals reversed a judgment of the district court. The court held that in an employment-discrimination claim under 42 U.S.C. § 1983, the date of termination starts the running of the statute of limitations on an employee's con-

*Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

stitutional claim based on a government entity's ongoing policy of gender discrimination in employment.

When she went to work as a clerk for appellee County of Placer in 1982, appellant Yovana Gutowsky had a Bachelor of Science degree. Gotowsky wanted to become an equipment operator, but under California law, she needed a commercial driver's license. Despite her repeated requests for permission to practice on County equipment for her commercial license test over a period of over ten years, Gutowsky's supervisors either refused or failed to grant it. They cited County policy, did nothing, noted that she was a "mere woman," or laughed. One supervisor said that it was "ridiculous" when Gutowsky passed the written test for a commercial license.

During the same period, less-qualified male employees were promoted over Gutowsky after securing commercial drivers' licenses on County time. Gutowsky never submitted an application for a position as road-maintenance worker because she believed that management's attitude made an application by a woman futile. Gutowsky was never promoted despite consistent and outstanding performance evaluations. She resigned on May 26, 1993.

On May 24, 1994, Gutowsky filed an action against the County under 42 U.S.C. § 1983, alleging gender discrimination in employment in violation of the equal protection and due process clauses of the Fourteenth Amendment.

On the County's motion for summary judgment, Gutowsky's evidence included 67 rejected applications by women that included the road maintenance position. She also submitted evidence that no woman had ever been hired for a full-time position in that field. The district court ruled that Gutowsky's action was timed-barred because she did not bring it within one year of the last alleged act of discrimination.

Appendix C

On appeal, Gutowsky contended that the "continuing violations" doctrine applied, and that the one-year period of the governing statute of limitations did not commence until the day she left her employment. She asserted that the County's widespread policy and practices of discrimination continued every day of her employment, including days that fell within the limitations period.

[1] The County suggested no cogent reasons why the "continuing violations" doctrine used in Title VII claims should not be applied in § 1983 cases. [2] A plaintiff in a Title VII action who alleges a policy or practice of systematic discrimination may in certain circumstances utilize the continuing violations doctrine. This is because the employer's discriminatory policy continually deters the employee from seeking full employment rights, or threatens to adversely affect the employee in the future.

[3] As in a Title VII claim, a policy or practice of continuing employment discrimination is under attack in a § 1983 claim for employment discrimination. In order to sue a municipality under § 1983, a plaintiff must show execution of a government's policy or custom that inflicts the injury. If the continuing violations doctrine were inapplicable, it would be difficult to ascertain exactly when such claims would accrue, especially if no specific discriminatory acts evidenced the policy during the year immediately prior to the filing of the lawsuit. The continuing violations doctrine therefore applied.

[4] Gutowsky had to show a series of related acts, one or more of which fell within the limitations period, or the maintenance of a discriminatory system both before and during that period. A continuing violation may be established through a series of related acts against one individual, or by a systematic policy or practice of discrimination.

[5] Gutowsky's motion papers were replete with evidence of an ongoing practice and policy that denied opportunity to

women to move into the equipment-operating positions. [6] Gutowsky presented specific examples of discrimination that were not the basis of her charge of discrimination, but evidence that a *policy* of discrimination pervaded her employer's personnel decisions. [7] The County ignored the portions of Gutowsky's claim of explicit experiences of discrimination that were a continuing pattern of discriminatory action in its promotion and placement procedures, and that these practices and procedures were in place during the entire period of Gutowsky's employment.

[8] A material question of fact was presented by Gutowsky's pleadings and proffer. A trier of fact could have found that the County's discrimination against women as equipment operators continued up to and including the last day Gutowsky worked. Her claim was timely.

[9] A plaintiff need not apply for a job if the application would have been futile. In such an instance, the plaintiff must show that he or she was a potential victim of unlawful discrimination, and establish that he or she would have applied for the job had it not been for the discriminatory practices. [10] A jury could have believed from Gutowsky's evidence that her application would have been futile. A triable issue of fact was also supported by evidence demonstrating that she was continually rebuffed in her attempts to practice on County equipment in order to obtain her commercial driver's license.

COUNSEL

Cindy L. Robbins, Mackenroth, Ryan, Jacobson & Fong, Sacramento, California, for the plaintiff-appellant.

Cris C. Vaughan, Deputy Placer County Counsel, Auburn, California, for the defendant-appellee.

Appendix C

OPINION

GOODWIN, Circuit Judge:

Yovana Gutowsky appeals the summary judgment granted in favor of defendant-appellee County of Placer. The district court found that Gutowsky's claims under 42 U.S.C. § 1983 were time-barred because they were not brought within the one-year limitation period applicable to such claims. Gutowsky challenges this ruling, asserting that because the discriminatory policies and practices were continuous violations throughout her County employment, the limitation period did not begin to run until the day she quit her job. We reverse and remand.

Factual and Procedural Background

Gutowsky was hired in March of 1982 by the County of Placer Department of Public Works, Road Division, as a communications clerk. Her duties in that position included answering phones, dispatching road crews, collecting fees, doing radio work and handling payroll. Gutowsky was so employed for ten years; and although her duties increased, she was never promoted. Gutowsky claims that discriminatory policies and practices in the County's hiring and promotional procedures denied her an equal opportunity to advance in her employment.[1]

---

[1]Gutowsky's First Amended Complaint for Damages alleges:

8. At all times mentioned herein, the COUNTY OF PLACER, DEPARTMENT OF PUBLIC WORKS, had a policy, practice, and/or custom to employ gender-based criteria in hiring, assigning, promoting, and disciplining staff in the ROADS [sic] DIVISION, specifically at the Tahoe location in Placer County, and to deny employment and advancement to women. Pursuant to this policy, practice or custom, among other actions, the COUNTY precluded females from obtaining permits to operate ROADS DIVISION equipment, thereby limiting the tasks performed by female employees, including plaintiff, within a male-dominated department.

Appendix C

Gutowsky wanted to become an equipment operator, but under California law, she needed a commercial driver's license. Gutowsky asserts that male road crew workers were allowed to use county equipment to practice for their com-

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. . . .

10. Plaintiff alleges that it was the policy, practice and/or custom of the COUNTY to promote and otherwise ensure the career advancement of less qualified male employees by assisting them in obtaining their Class I licenses for operating ROADS DIVISION equipment, where these same opportunities were not provided to better qualified female employees, including plaintiff.

. . . .

A. Discriminatory hiring and promotion practices

Plaintiff YOVANA GUTOWSKY holds a Bachelor of Science degree in National Resources and Business Administration. She began working for the COUNTY in PUBLIC WORKS, ROADS DIVISION, at the Tahoe Administration Building in 1982. From that time until the time she was forced to resign in May 1993, she was not given a single promotion despite consistent and outstanding performance evaluations. During this same time period, defendant COUNTY repeatedly hired numerous entry-level male employees as "Equipment Operators." The COUNTY allowed these male employees, who were not college educated, to obtain Class I licenses to operate equipment during their regular working hours.

. . . .

13. Despite plaintiff's repeated requests to obtain her Class I license, defendants, and each of them, declined to allow her to apply for a Class I license on COUNTY time, and repeatedly told plaintiff that she could not operate equipment because she was female.

. . . .

14. Throughout the 11 1/2 years plaintiff was employed with the PUBLIC WORKS ROADS DIVISION, not a single female employee was accepted as an equipment operator, full time, on a promotion track. During the entire 11 1/2 years plaintiff was employed at the ROADS DIVISION in Tahoe, not a single female employee of the ROADS DIVISION was promoted. During this same period of time, numerous male employees with lesser qualifications were promoted, advanced in their careers and offered higher paying jobs at the Auburn facility.

mercial license tests. She "frequently" asked her supervisor Leonard Zick if she could use the County's equipment to practice. In response to her request in 1983, Zick told her that "she could not do it because it was not County policy." That same year, Gutowsky asked the Director of Public Works, John McGowan, for use of the County's equipment. McGowan retired shortly thereafter, and the request "didn't go anywhere." In 1988, Zick transferred out of the Tahoe office and Kenneth Compton became Gutowsky's supervisor. Gutowsky asked Compton if she could use the County's equipment, and he responded that she was "a mere woman and a secretary and a clerk."

In 1991, Gutowsky talked to Assistant Director Jan Witter about using the County's equipment to practice for her commercial driver's license, and in response, he "laughed."

Gutowsky continued to ask Compton, at least once a year during her review time, to use the County's equipment to practice. Meanwhile, Gutowsky actually took and passed the written test for a Class I commercial driver's license. Compton said the fact that Gutowsky had taken the written test was "ridiculous."

Compton was replaced as Gutowsky's supervisor by Pete Caravella in 1992. Gutowsky continued her efforts to obtain permission to use the County's equipment while Caravella was her supervisor. Attempts by Caravella to accommodate Gutowsky's requests to utilize the equipment were rebuffed by Witter. She alleges that Caravella and Compton discussed her request as late as May, 1993, to no avail.

Jim Gray, personnel director for the County, said he was not aware of any women having been hired as full-time road maintenance workers. The reason for this, he states, is that "women have not applied for these jobs." Gutowsky submitted as evidence sixty-seven job applications from women that list "Road Maintenance Worker" as one of the positions for

which they would like to apply. It is apparently undisputed that no woman had ever been hired as a full-time equipment operator or road maintenance worker at the time Gutowsky brought this action.

In order to obtain a position with or to be promoted by Placer County, a person is required to submit an application, undergo an examination process, and be placed on an eligibility list, pursuant to the Civil Service Commission rules of the County. Gutowsky never submitted an application for a position as a road maintenance worker or as an equipment operator with the County. She asserted that she did not submit a formal application because she believed that management's attitude made an application by a woman futile.

Gutowsky's employment with the County of Placer ended on May 26, 1993. This action was filed on May 24, 1994. The district court found that Gutowsky's claim was time-barred because it was not brought within one year from the date of the last discriminatory comments made by Gutowsky's supervisors. The district court granted the County's motion for summary judgment on that basis on August 18, 1995.[2]

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[2]The court stated:

> Again, assuming but not deciding that plaintiff states a claim for intentional discrimination in violation of the 14th Amendment equal protection and due process clauses, her claim is time-barred. Specifically plaintiff maintains that she was discouraged from applying for non-clerical positions as early as 1983, which discouragement continued through 1993, and that she persisted in her attempt to promote to an equipment operator during the time that Caravella was her supervisor in 1992 and 1993, and that her supervisors discussed this matter among themselves as late as, "May, 1993."
>
> However, to the extent that plaintiff relies on statements made by Compton, supervisor to Caravella, that it was plaintiff's job to answer the phones, even assuming that this statement can be considered to be an act of discrimination, plaintiff has failed to demonstrate that such statements were made within the one-year period prior to the filing of the complaint.

Appendix C

Standard of Review

We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. This court does not weigh the evidence or determine the truth of the matters asserted. We decide only whether there is a genuine issue for trial. *Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1130-31 (9th Cir. 1994).

Analysis

Gutowsky and the County agree, as do we, that the appropriate limitation period under California law for a Section 1983 claim is one year. *McDougal v. County of Imperial*, 942 F.2d 668, 672 (9th Cir. 1991); Cal. Civ. Proc. Code § 340(3). The parties disagree, however, when the one-year limitation period should commence. Gutowsky argues that the "continuing violations" doctrine applies and that the year began on the date she left her employment. We agree with Gutowsky.

I. The Continuing Violations Doctrine in Section 1983 Claims

[1] Noting the "dearth of authority" regarding the timeliness of a *Monell*[3] employment discrimination suit under Section 1983, Gutowsky argues that the "continuing violations" doctrine used in Title VII claims should be applied in Section 1983 cases. The County suggests no cogent reasons why this should not be the case.

[2] A plaintiff in a Title VII action who alleges a policy or practice of systematic discrimination, as opposed to alleging

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[3]Referencing *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

only individual discriminatory acts, may in certain circumstances utilize the continuing violations doctrine. Under this approach, an action is always timely if brought by a present employee. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 761 (9th Cir. 1980) (citation omitted). This is because the employer's discriminatory policy "continually deters the employee from seeking . . . full employment rights or threatens to adversely affect [the employee] in the future." *Id.*

[3] As in a Title VII claim, a policy or practice of continuing discrimination is under attack in a Section 1983 claim for employment discrimination. Indeed, in order to sue a municipality under Section 1983, a plaintiff must show "execution of a government's policy or custom . . . [that] inflicts the injury." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). If the continuing violations doctrine were inapplicable to *Monell* actions, it is difficult to ascertain exactly when such claims would accrue, especially if no specific discriminatory acts evidenced the policy during the year immediately prior to the filing of the lawsuit. Therefore, the continuing violations doctrine is applicable to *Monell* actions.

II. Continuing Violations Doctrine Applied in this Case

[4] To invoke the continuing violations doctrine in her case, Gutowsky must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during [that] period. *Green v. Los Angeles County Superintendent of Schs.*, 883 F.2d 1472, 1480 (9th Cir. 1989) (citations omitted). Thus, a continuing violation may be established through a series of related acts against one individual, or by a systematic policy or practice of discrimination. *Id.*

[5] The County asserts that the doctrine of continuing violations does not apply because Gutowsky offered insufficient evidence of such violations. The County is mistaken. Gutowsky's motion papers were replete with evidence of an

ongoing practice and policy that denied opportunity to women to move into the equipment operating positions.

In *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980), we reversed a district court decision in a case in which plaintiff alleged a policy of continuing discriminatory practices. In *Reed*, the district court found that plaintiff had alleged only three instances of discrimination, and held that her claim was time-barred because it had not been filed within the appropriate time period from the date of the last discriminatory instance. *Id.* On appeal, we held that:

> The complaint should not be read so narrowly. Her allegations included a sweeping attack on Lockheed's systems of promotion, compensation and training. She alleged that the violations took place throughout her service at Lockheed and until the day she filed her complaint. . . . [E]ach day without promotion constituted a new violation of Title VII, assuming that similarly situated males were promoted with more regularity.

Id. at 759-60.

[6] Like the *Reed* plaintiff, Gutowsky presents specific examples of discrimination which "are not the basis of her charge of discrimination" but rather "are but evidence that a *policy* of discrimination pervaded [her employer's] personnel decisions." *Id.* at 760. Indeed, Gutowsky contends that the widespread policy and practices of discrimination of which she complains continued every day of her employment, including days that fall within the limitation period.

[7] The County's theory ignores the portions of Gutowsky's claim of explicit experiences of discrimination that show these to be a continuing pattern of discriminatory action in its promotion and placement procedures; and that these practices and procedures were in place during the entire

period of Gutowsky's employment. The significance of the fact that Gutowsky's name did not appear on an eligibility list in December 1992 is for the trier of fact to consider. The publication of the list did not necessarily signal the end of those practices. Publication of such a list was completely consistent with a policy against putting women in the cabs of snowplows and other heavy equipment.

III. Date of Accrual of the Action

[8] We hold that the doctrine of "continuing violations" applies in this case. A material question of fact is presented by Gutowsky's pleadings and proffer. A trier of fact could find that the County's discrimination against women as equipment operators continued, at least in Gutowsky's area of employment up to and including the last day she worked. Accordingly, her claim, filed within one year of her last day of work was timely.

IV. Effect of Gutowsky's Failure to Apply for the Position

The County claims that Gutowsky's failure to submit an application for the position of road maintenance worker or equipment operator precludes her from maintaining a Section 1983 lawsuit for employment discrimination. The County cites *Tagupa v. Board of Directors*, 633 F.2d 1309 (9th Cir. 1980), for the premise that submission of an application is a necessary element of a Section 1983 claim for wrongful denial of a certain job.

[9] The Supreme Court has held, however, that a plaintiff need not apply for a job if the application would have been futile. *Int'l Bhd of Teamsters v. United States*, 431 U.S. 324, 365-68 (1977). In such an instance, the plaintiff must show that he or she "was a potential victim of unlawful discrimination" and, to that end, the plaintiff must establish that he or she "would have applied for the job had it not been

for those [discriminatory] practices." *Id.* at 367-68. While *Teamsters* is a Title VII case, we have recognized the potential for its application in Section 1983 actions. *Tagupa*, 633 F.2d at 1312 n.2 (stating that, because Tagupa brought forth no evidence to indicate that he was discouraged from applying for the job, "he can draw no comfort from the analysis in . . . *Teamsters* . . ., wherein the Supreme Court recognized that circumstances may excuse the requirement that a plaintiff apply for the position").

[10] The County argues that Gutowsky has not submitted any evidence to show that she reasonably believed that submission of an application for the position would be futile. The jury could very well believe from Gutowsky's evidence of sixty-seven applications by women that included the road maintenance position, that her sixty eighth application would have been futile. She also submitted evidence that no woman has ever been hired for a full-time position in that field. A triable issue of fact is also supported by evidence demonstrating that she was continually rebuffed in her attempts to practice on County equipment in order to enable her to obtain her commercial driver's license.

Conclusion

In this case the limitation period began to run on Gutowsky's last day of work for the County. Her claim was not time barred. Triable issues of fact are: (1) Whether the County's management personnel had a policy or custom barring the employment of women as road maintenance workers or equipment operators. (2) Whether an application for a position as an equipment operator would have been futile. On this record, summary judgment was not appropriate.

REVERSED and REMANDED.

APPENDIX D — REPORTER'S TRANSCRIPT, UNITED STATES COURT OF APPEALS, COURT'S RULING ON MOTION FOR SUMMARY JUDGMENT DATED AUGUST 18, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CV S 94-0818

BEFORE THE HONORABLE EDWARD J. GARCIA, JUDGE

Yovana Gutowsky,

Plaintiff,

vs.

County of Placer,

Defendant.

REPORTER'S TRANSCRIPT

COURT'S RULING ON MOTION FOR SUMMARY JUDGMENT

FRIDAY, AUGUST 18, 1995

Reported by: MARGARET A. McNAMARA, CSR #6729

APPEARANCES

For the Plaintiff:

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MACKENROTH RYAN JACOBSON FONG
1610 Arden Way, Suite 250
Sacramento, California 94815-4032
By: Cindy Robbins, Atty at Law
and
Timothy Ryan, Atty at Law

For the Defendant:

PLACER COUNTY COUNSEL
Placer County Administrative Center
175 Fulweiler Avenue, Room 301
Auburn, California 95603-4581
By: Cris C. Vaughan, Deputy County Counsel

Appendix D

[1] SACRAMENTO, CALIFORNIA
Friday, August 18, 1995, 9:00 A.M.

THE COURT: Civil case number 94-0818, Yovana Gutowsky versus County of Placer, defendant.

MS. ROBBINS: Good morning, your Honor, Cindy Robbins for the plaintiff.

MR. VAUGHAN: Good morning, your Honor, Cris Vaughan on behalf of the defendant, County of Placer.

THE COURT: Mr. Vaughan.

MR. RYAN: Good morning, your Honor, Timothy Ryan on behalf of the plaintiff.

THE COURT: Mr. Ryan.

Give me a minute to review my notes. This matter is on calendar on defendant's motion for summary judgment. Defendant moves for summary judgment on the two causes of action pled which are brought pursuant to Section 1988 of the Civil Rights Act contending that they are one, time-barred, and alternatively that plaintiff has failed to submit evidence of intentional discrimination. I've reviewed the briefs on the matter.

Is there anything you want to add on the motion, Mr. Vaughan, not covered in your briefs?

[2] MR. VAUGHAN: We would submit it, your Honor.

THE COURT: Mr. Ryan or Ms. Robbins, anything to add?

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MS. ROBBINS: Just briefly, your Honor. With respect to the statute of limitations, specifically on the plaintiff's claims of hiring and promotion, in a case cited in the defendant's reply brief, Ninth Circuit *Reese vs. Lockheed Aircraft*, a challenge to systematic discrimination is always timely if it's brought by a present employee. Here the plaintiff brought suit within a year of leaving employment at 762 — page 762 of that case, which is 613 F 2d.

The Ninth Circuit held that when a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as he who goes through the motions of submitting an application. The plaintiff's claims are for denial of equal protection and due process. She offers substantial evidence of these claims within the limitations period.

THE COURT: Mr. Vaughan, if you submit the matter I'm going to grant your motion on statute of limitations grounds.

[3] MR. VAUGHAN: Submitted, your Honor.

THE COURT: Section 1983 actions are governed by a one-year statute of limitations. Plaintiff, a Department of Public Works employee of the defendant county, contends that she was subjected to sexual harassment in the form of a hostile work environment and was denied promotional opportunities based on her sex in violation of state and federal constitutional equal protection and procedural due process rights. On the motion plaintiff submits evidence that she was subjected to a hostile working environment during two specific periods of her eleven-year employment with the county.

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First, from 1982 through 1988 she was verbally and physically harassed by her supervisor Leonard Zick, and from 1988 through December of 1991 she was verbally harassed by her supervisor Kenneth Compton. Assuming, without deciding that the conduct complained of constituted actionable sexual harassment and that it was continuous from 1982 through 1991, any Section 1983 action based on this conduct would have had to have been filed no later than December of 1992.

Plaintiff's complaint filed May 24, 1994 is 17 months late. Plaintiff attempts to revive her claim[4] through the testimony of one Peter Caravella, who replaced Kenneth Compton as her supervisor. She testifies that Compton, after he was no longer plaintiff's supervisor, continued to make derogatory remarks about women through at least May of 1993. However, these remarks were made to Caravella, and there is no evidence presented to show that plaintiff was present or overheard these remarks, or that they contributed in any way to a hostile working environment so pervasive that it altered the conditions of plaintiff's employment.

As the Supreme Court *Ricks* and the Ninth Circuit *London* cases cited by defendant teach, for complaints which purport to rely on a continuing civil rights violation theory, as does plaintiff here, the statute of limitations begins to run on the date of the last discriminatory act, and not on the date the consequences of that act are felt. Here the last date on which plaintiff worked with and was subject to derogatory remarks from her supervisor, Compton, was in December of 1991. Therefore the last discriminatory act of sexual harassment directed towards plaintiff occurred on that date.

Defendant's motion for summary judgment on the [5] two

causes of action pled, to the extent they allege section 1983 violations based on sexual harassment, is granted as time-barred. Plaintiff also contends that her 14th Amendment equal protection and due process rights were violated when she was denied, on the basis of her gender, the opportunity to promote to a non-clerical position. The evidence shows that during her employment with the county, plaintiff never completed an application for such a position. Plaintiff contends, however, that that was because she was discouraged from doing so.

Again, assuming but not deciding that plaintiff states a claim for intentional discrimination in violation of the 14th Amendment equal protection and due process clauses, her claim is time-barred. Specifically plaintiff maintains that she was discouraged from applying for non-clerical positions as early as 1983, which discouragement continued through 1993, and that she persisted in her attempt to promote to an equipment operator during the time that Caravella was her supervisor in 1992 and 1993, and that her supervisors discussed this matter among themselves as late as, "May, 1993."

However, to the extent that plaintiff relies [6] on statements made by Compton, supervisor to Caravella, that it was plaintiff's job to answer the phones, even assuming that this statement can be considered to be an act of discrimination, plaintiff has failed to demonstrate that such statements were made within the one-year period prior to the filing of the complaint. Defendant's motion for summary judgment on plaintiff's 14th Amendment claims of equal protection and due process violations based on intentional sexual discrimination in the form of failure to promote is also granted. These claims are also time-barred by Section 1983 one-year statute of limitations. Having granted summary judgment in defendant's favor on the Section

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1983 federal claims which gave this Court its original jurisdiction, I now decline jurisdiction over the purely state constitutional claims pursuant to section 1367(c)(3) of Title 28. With this disposition I do not reach defendant's other bases for the motion. We'll prepare a summary order and direct the clerk to enter final judgment in favor of defendant.

Anything further Mr. Ryan?

MR. RYAN: No, your Honor.

THE COURT: Ms. Robbins?

[7] MS. ROBBINS: No, your Honor.

THE COURT: Mr. Vaughan?

MR. VAUGHAN: No, sir.

THE COURT: All right. Thank you, counsel.

(Whereupon the proceedings were adjourned.)

Appendix D

[8] REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, MARGARET A. McNAMARA, certify that I was the official Court Reporter, and that I reported verbatim in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 1 through 7, inclusive, constitute a complete, true, and correct record of said proceedings:

COURT: U.S. District Court
Eastern District of California

JUDGE: Honorable EDWARD J. GARCIA, Judge

CAUSE: Yovana Gutowsky vs. County of Placer

Case No. CV S 94-0818

DATE: Friday, August 18, 1995

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on the 8th day of September, 1995.

MARGARET A. McNAMARA
CSR No. 6729

APPENDIX E — ORDER AFTER HEARING OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED AUGUST 22, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV NO. S-94-0818 EJG/JFM

YOVANA GUTOWSKY,

Plaintiff,

v.

COUNTY OF PLACER,

Defendant.

ORDER AFTER HEARING

This matter was before the court on August 18, 1995, for hearing on defendant's motion for summary judgment. Cindy Robbins and Timothy Ryan appeared on behalf of plaintiff. Chris Vaughan appeared on behalf of defendant. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1. Defendant's motion for summary judgment is granted on the grounds that plaintiff's section 1983 claims are time-barred. The court does not reach defendant's alternative arguments.

2. Having dismissed all claims over which the court has original jurisdiction, the court declines supplemental jurisdiction over the state constitutional claims contained in the complaint and those claims are now dismissed. *See* 28 U.S.C. § 1967(c)(3).

3. The Clerk of Court is directed to enter judgment in favor of defendant.

IT IS SO ORDERED.

Dated: August 18, 1995

s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
SEP 8 1997
CLERK

No. 97-247

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF PLACER,

Petitioner,

vs.

YOVANA GUTOWSKY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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19pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a *Monell*[1] action which attacks the policies of a public employer under 42 U.S.C. Section 1983 timely when brought within one year of the employee's separation of employment where the challenged policy was in place at the time of separation and the employee was injured by it?

2. Is the continuing violations doctrine an appropriate vehicle to analyze a Section 1983 claim alleging a discriminatory employment policy?

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[1] Referencing, *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

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STATEMENT OF THE CASE

The following evidentiary facts are relevant:

Gutowsky was first employed for the County of Placer, Department of Public Works Road Division in March 1982. (E.R. pp. 42:23-25; 149:21-27). Gutowsky remained employed in the position of communications clerk for approximately ten years. Although Gutowsky's responsibilities increased, she never was promoted. (E.R. pp. 172:15-19; 173:1-3).

Gutowsky's last day at her job was May 26, 1993. On this day Gutowsky was taken to a psychologist and subsequently placed on medical leave. She never returned. (E.R. pp. 58:5-28; 127-128).

Gutowsky appealed the district court's grant of summary judgment in favor of petitioner with respect to her claim that she did not promote on account of the County's discriminatory policies which persisted at least until she last worked. In this latter connection, Gutowsky's complaint specifically pleaded a broad attack on the County's hiring and promotion policies regarding women. (App. C to Petition, p. 8a, note 1; E.R. pp. 15-17).

From the time she first became a full-time employee in 1983 it was Gutowsky's goal to promote. To do so in her department she needed experience operating the road equipment to obtain a commercial driver's license. (E.R. pp. 159-160; 179:1-182:7; 234:7-17).

According to the County, Gutowsky's "performance evaluations were favorable and her supervisor commented on the quality of her work in a stressful job dealing with the public." (E.R. pp. 57:17-20; 117:7-13).

Gutowsky was never disciplined for misconduct in the workplace. (E.R. pp. 117:14-19). Gutowsky's supervisor could not recall any inappropriate behavior on Gutowsky's part on the job. (E.R. 117:20-25). In addition, Gutowsky holds a four year college degree which she completed prior to the time she became a full-time employee for the County. (E.R. pp. 154:25-28; 167:25-168:1).

Gutowsky asked her first supervisor, Leonard Zick, if she could practice on County equipment for a commercial driver's license in 1983. Zick told Gutowsky that she "could not do it because it was not County policy." (E.R. pp. 159:4-8; 178:16-26). In 1985 Gutowsky also asked Jack Warren, the Assistant Director of Public Works, if she could use equipment for a commercial driver's license test. In 1983 Gutowsky also asked John McGowan, the Director of Public Works, if she could use County equipment to practice for her commercial license. Gutowsky also spoke with Assistant Director Jan Witter about obtaining a Class I license and he "laughed." (E.R. pp. 159:12-23; 179:25-182:11). Unlike Gutowsky, male road crew members were allowed to use County equipment to practice for commercial licenses. (E.R. pp. 159:15-20; 234:14-17; 231:17-23).

During 1991 Gutowsky again asked Witter if she could use County equipment to obtain a commercial license. Witter laughed and did not answer Gutowsky's question. (E.R. pp. 159:23-27; 181:26-182:11). Gutowsky also asked her supervisor, Ken Compton, if she could utilize County equipment for this purpose. When Gutowsky asked Compton if she could use County equipment to practice for a Class I test, Compton said that

Gutowsky was "a mere woman." Gutowsky nonetheless asked Compton at least once a year during her review time if she could practice on County equipment to obtain a Class I license. (E.R. pp. 160:1-8; 183:14-22).

Gutowsky actually took and passed the written test for a Class I commercial driver's license in 1990 or 1991. Gutowsky told Compton that she had passed the written test for the commercial license. (E.R. pp. 160:9-13; 183:23-184:12).

Gutowsky persisted in her attempts to promote and become an equipment operator on at least six occasions during the time that Peter Caravella was her supervisor from 1992 through May of 1993. Caravella thought this was a good idea. However, any attempts Caravella made to give Gutowsky field training necessary for promotion were met with reprimands from Witter and Compton. Compton and Caravella discussed this specific matter as late as May 1993. (E.R. pp. 160:16-28; 207:10-27).

Jim Gray, the Personnel Director for the County, is not aware of any women being hired as full-time road maintenance workers. Gray testified that "[m]y perception is that women have not applied for these jobs. There may have been a woman or two women or three women that have applied, but I'm telling you . . . they have not applied." When asked what his perception was based on, Gray replied: "Because of my capacity as personnel director and generally knowing what's going on and generally knowing the . . . applicants." (E.R. pp. 223:24-225:5; 226:7-19).

In stark contrast to Gray's testimony, from 1992 through May 1993 alone, the County of Placer received 67

written applications from women seeking positions with the County which requested the classification of road maintenance worker. (E.R. pp. 240-378). No woman has ever been hired full-time either as a road maintenance worker or as an equipment operator. (E.R. p. 231:17-23).

Gutowsky filed this action on May 24, 1994, within one year of her last day at work, May 26, 1993. (E.R. p. 1). The district court granted the County's motion for summary judgment on statute of limitations grounds without reaching its other arguments. (E.R. pp. 466:23-25; 470:12-18). The County asserted that Gutowsky's claim accrued one year after "the last equipment operator eligibility list for the Department of Public Works, Tahoe, was certified." (E.R. p. 62:3-12). The district court disagreed with the County's chosen accrual date finding that Gutowsky's claim accrued one year after her former supervisor, Compton, made a discriminatory remark. (E.R. pp. 469-470). Nor did the district court comment at all on the scores of applications submitted by women for the sought position. Gutowsky submitted these applications, received by the County through May of 1993, as evidence in support of her claim. (E.R. pp. 465-471).

Gutowsky asserted both to the district court and to the court of appeals that since she was continuously injured by an existing policy of discrimination which was in place when she last worked, her separation date is the date on which her claim accrued. (E.R. p. 466:4-22; *and see,* Brief of Appellant, pp. 11-12, "[U]nless the statute of limitations started running for Gutowsky when she last worked for the County, the accrual of her claim cannot be pinpointed . . . [the standard] rule does not state when an employee should know a policy is discriminatory or

when an adverse employment decision is motivated by policy.") The Ninth Circuit agreed with Gutowsky. (App. C to Petition, p. 12a).

ARGUMENT

A. There Is No Disagreement Among the Circuits Regarding The Timeliness of Gutowsky's Policy Claim

Sixty-seven women applied and not one was hired. This is not a case alleging a discrete *act* of discrimination, but a challenge to a widespread *policy* of discrimination of which Gutowsky was a victim.

The County argues that "[t]here is great deal [sic] of disparity . . . among the circuits", and cites largely inapposite cases as examples of "[c]ircuits . . . basically concluding that § 1983 actions accrue when a plaintiff should be aware of the injury and its connection to the acts of the defendants . . . " Citing, *Association Against Discrimination and Employment, Inc. v. City of Bridgeport,* 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982); *Acha v. Beame,* 570 F.2d 57, 65 (2d Cir. 1978) and *Lavellee v. Listi,* 611 F.2d 1129, 1131 (5th Cir. 1980). (Petition, p. 7).

Gutowsky does not quarrel with the County's recitation of the federal standard on claim accrual. The County fails to explain, however, *when* this date accrues in a case like Gutowsky's where an unconstitutional policy persists. Nor does the County consider that its argument would permit it to continue to implement a discriminatory policy indefinitely.

In *City of Bridgeport*, a Title VII case, the Second Circuit opined that:

> Where . . . the defendant has engaged in a continuous policy of discrimination, acts in furtherance of that policy are not viewed in isolation. In such circumstances if the charge has been filed no later than 300 days, after the *last* act by the defendant pursuant to its policy, the plaintiff may recover for earlier acts of discrimination as well. [Citation].

City of Bridgeport, supra, 647 F.2d at 274 (emphasis original). Quoting petitioner's other authority of choice, *Acha v. Beame*, the court explained this principle as follows:

> To succeed at trial, the appellants must be able to demonstrate a Title VII violation occurring after the effective date of the Act and within the period of the statute of limitations . . . But such a violation is not limited to hiring violations *per se*.
>
> A continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the *last occurrence* of an instance of that policy . . . Furthermore, where an illegal policy is so maintained, relief for injuries sustained even before the beginning of the limitations period is appropriate.

Id., quoting, *Acha v. Beame, supra*, 570 F.2d at 65.

Although the facts of these cases by no means resemble hers, even under this analysis Gutowsky's claim is timely. Her record is undisputed that through May 1993 the County had received scores of applications from women seeking equipment operating positions, and the

County persisted in refusing to hire even one of them. (E.R. pp. 231:17-23; 240-378).

Lavellee gets closer to the issue, but to no avail to the County. In this Section 1983 medical malpractice action, the Fifth Circuit acknowledged that it "can be exceedingly difficult to apply" the federal standard regarding claim accrual to constitutional torts. Exploring this issue further the court rejected the very proposition asserted by petitioner here: that such a claim accrues at the "moment of injury." 611 F.2d at 1131.[2]

Although the opinion limits itself to the analysis of a medical malpractice claim (no existing *policy* was challenged by the plaintiff), it cites this Court's decision in *United States v. Kubrick*, 444 U.S. 111 (1979):

> [T]he Supreme Court has rejected the standard which would allow the statute of limitations to commence running before the plaintiff was or should have been aware of the causal connection between his injury and the acts of the defendants. Until the plaintiff is in possession of the "critical facts that he has been hurt and who has inflicted the injury," *id.*, the statute of limitations does not commence to run.

Lavellee v. Listi, 611 F.2d at 1131, quoting, *Kubrick*, 444 U.S. at 121.

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[2] The County over-simplifies what is and should remain a careful constitutional analysis when it asserts that, "[i]t is not difficult at all to ascertain exactly when a claim accrues under a § 1983 *Monell* action for it is simply the date on which a discriminatory act took place." (Petition, p. 9).

The Fifth Circuit determined that it did not have sufficient facts to apply this standard – no evidence was presented by the defendant that the plaintiff should have known of the facts giving rise to a legal claim sooner. *Id.*, 611 F.2d at 1131-1132. So is the case here. The County offered no evidence to indicate that Gutowsky should have been aware that scores of women had applied for the sought positions to no avail, or that her failure to promote and train was the product of an unconstitutional policy promulgated by her employer.

Moreover, Gutowsky's record is virtually undisputed that this policy was alive and well when she last worked. Unlike an unnecessary spinal tap, a policy excluding women from sought positions is even more difficult to identify as a violation by a particular plaintiff who has no access to critical evidence notwithstanding her own injury in fact.

Better defining the contours of the particular constitutional tort here is the court of appeals below. The court relied on factually apposite case authority and explained its reasoning as follows:

> In *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980), we reversed a district court decision in a case in which plaintiff alleged a policy of continuing discriminatory practices. In *Reed*, the district court found that plaintiff had alleged only three instances of discrimination, and held that her claim was time-barred because it had not been filed within the appropriate time period from the date of the last discriminatory instance. On appeal we held that:

> The complaint should not be read so narrowly. Her allegations included a sweeping attack on Lockheed's systems of promotion, compensation, and training. She alleged the violations took place throughout her service at Lockheed and until the day she filed her complaint. . . .
>
> Like the *Reed* plaintiff, Gutowsky presents specific examples of discrimination which "are not the basis of her charge of discrimination but rather are but evidence that a *policy* of discrimination pervaded [her employer's] personnel decisions." [Citation]. Indeed, Gutowsky contends that the widespread policy and practices of discrimination of which she complains continued every day of her employment, including days that fall within the limitation period.

Gutowsky v. County of Placer, 108 F.3d 256, 260 (9th Cir. 1997), quoting, *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 759-760 (9th Cir. 1980).

There is no great divide among the circuits regarding the timeliness of such claims, only fact specific analyses in diverse cases wherein the circuit courts grapple with the inherent difficulties of applying nineteenth century constitutional law to violations in contemporary society. The County repeatedly relies on authority, such as *Chardon v. Fernandez,* 454 U.S. 6 (1981) (Petition, pp. 3, 4, 5, 6), that does not deal with policy claims at all, but with discrete acts of discrimination, such as a single firing or demotion.

By its petition the County urges this Court to disregard the most insidious discrimination in public employment. By its analysis, a "White's Only" sign on the hiring

door would be permissible if not challenged within a year of the last black employee unfortunate enough to see it.[3] No case cited by the County supports such a restrictive view.

B. The Application Of The Continuing Violations Doctrine To Gutowsky's Section 1983 Claim Is A Logical Extension Of Existing Law Consistent With The Treatment Of Title VII Claims

In *Gutowsky*, the court held that the continuing violations doctrine would apply to her case. 108 F.3d at 259 (App. C to Petition, pp. 12a-13a). *Gutowsky* expressly finds the doctrine applicable to constitutional torts alleged by public employees. *Id.* Although the Ninth Circuit had not so explicitly held prior to this time, it had long analyzed Section 1983 claims, as has at least one

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[3] This Court explained this point well in *International Bro'hood of Teamsters v. United States*, 431 U.S. 324, 365 (1977):

> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices – by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, by his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

other circuit, in the context of the continuing violations doctrine.

In *Green v. Los Angeles County Superintendent of Schs.*, 883 F.2d 1472 (9th Cir. 1989), for example, the court analyzed the plaintiff's Section 1983 claim under the doctrine, finding the facts of that case did not support its application as the incidents claimed by the plaintiff were not like and reasonably related and therefore not part of a "continuing pattern of discriminatory conduct." 883 F.2d at 1480.

In *Green*, the court presumed without comment that the doctrine might apply to the plaintiff's Section 1983 claims relying on settled Title VII law on point. *Id. Gutowsky* expressly acknowledges the propriety of such an analysis. 108 F.3d at 259.

This is not to say that Gutowsky's claims survive only by virtue of this common law doctrine. Her claim was timely nonetheless since her record showed that the challenged policy was both in place, and that she was subjected to it, within the limitations period. *See, e.g., Gutowsky*, 108 F.3d at 260 ("The County's theory ignores the portions of Gutowsky's claim of explicit experiences of discrimination that show these [instances] to be a *continuing pattern of discriminatory action in its promotion and placement procedures;* and that these practices and procedures were in place during the entire period of Gutowsky's employment." Emphasis added.) Gutowsky was injured by the County's policy every day she was subjected to it. In Gutowsky's case, the continuing violations doctrine does not salvage her claim, it merely defines its scope.

Again, the very authority relied on by the petitioner supports the doctrine's application to Section 1983 claims. As the Tenth Circuit notes in *Pike v. City of Mission*, 731 F.2d 655 (10th Cir. 1984), cited at page 8 of the petition:

> A continuing violation generally arises in the context of unconstitutional employment discrimination. It is usually based on a showing that an employer continues to implement an illegal system or policy, such as race discrimination, that came into being prior to the limitations period. . . . A suit challenging a systematic policy is not barred even though the policy began before the limitations period, because the policy itself continues to violate employees' rights. [Citations].

731 F.2d at 660.

Neither the courts in *Green* nor *Pike* expressly considered the potential applicability of the doctrine of continuing violations to Section 1983 actions. Both of these courts, however, naturally deferred to the doctrine as an appropriate analysis for the Section 1983 claims before them. Perhaps because the structured analysis of the doctrine lends itself well to the analysis of constitutional torts, these courts presumed the doctrine's application. As the Ninth Circuit notes in *Gutowsky*, "[t]he County suggests no cogent reason why this should not be the case." 108 F.3d at 259.

Gutowsky can think of good reasons why the opposite is true. First, civil servants should not be compelled to file a federal lawsuit at the first "moment" of perceived injury where an unconstitutional policy is at issue. Like all large employers, local government should be afforded

an opportunity to "clean its own house." Under the County's analysis those victimized by persisting illegal policies would be obliged to file multiple suits to right what is essentially the same wrong, and they would have to do so at the first suspicion of unlawful conduct subjecting them to injury. As is often the case with employment discrimination, these "first instances" may well be trivial and insufficient to state a constitutional tort.

A *Monell* plaintiff is obliged to demonstrate that the injury complained of is the product of a widespread policy or custom, and not merely an isolated incident or she does not state a claim. As this Court noted in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), an injury in isolation will not trigger liability under *Monell*. An injury must generally have been caused by an existing unconstitutional policy attributable to a municipal policymaker. "[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives . . . unless evidence be adduced which proves that the inadequacies resulted from conscious choice . . . " a plaintiff does not state a viable *Monell* claim. *Tuttle*, 471 U.S. at 823. Requiring employment plaintiffs to rush to federal court at the first hint of injury might therefore encourage legally insufficient claims and multiple suits.

Second, under the standard federal analysis of claim accrual there is a sort of continuing violations doctrine already – a claim does not accrue until the facts supporting it, in this case confidential applications, are possessed by the plaintiff. The continuing violations doctrine is no more radical a notion than this. The doctrine merely acknowledges the difficulty in pinpointing the accrual of

discriminatory policy claims, as opposed to, say, a negligently performed spinal tap.

Third, a separation date is easily discernable by both public employers and civil servants. Such a rule gives public employers plain notice that as long as they enforce illegal policies, employees injured by them may also challenge them. Without application of the doctrine, pinpointing the accrual date of a policy claim turns murky indeed. This case is a good example. The district court determined that Gutowsky's claim accrued when her supervisor happened to make a discriminatory comment evidencing an unlawful employment practice. (E.R. pp. 466:23-25; 470:12-18). The County asserted that Gutowsky's claim accrued one year after "the last equipment operator eligibility list for the Department of Public Works, Tahoe, was certified." (E.R. p. 62:3-12). Gutowsky argued successfully that it was neither.

Finally, as noted, the structural analysis employed by the courts under the continuing violations doctrine is particularly well suited to these difficult claims. The doctrine is the product of a vast body of employment discrimination law and, as a result, one of the most effective means by which to analyze constitutional employment torts.

No circuit has held the doctrine inapplicable to Section 1983 claims per se. The Ninth Circuit was correct in expressly acknowledging the propriety of the doctrine's application to Section 1983 employment actions.

CONCLUSION

For the reasons stated, the Court is requested to deny the petition for writ of certiorari.

Respectfully submitted,

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